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CASE NO. 97-375

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

WALTER GALE STEINHORST, *Petitioner,*

vs.

STATE OF FLORIDA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

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"Capital Case"

QUESTION PRESENTED

Steinhorst presents the following questions:

1. Whether one of the most basic fair trial rights granted by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the right to an unbiased and impartial judge, may be unintentionally waived by a criminal defendant, when the defendant is facing a death sentence and is unaware of the facts underlying the waiver?

2. Whether the State may impose an affirmative burden upon Petitioner or his counsel to investigate the background of the Judge who presided over Petitioner's state law collateral attack on his conviction to discover grounds for recusal when (a) Petitioner had no reason to suspect that cause for recusal existed; (b) the Judge failed to properly recuse himself from the case, having previously represented the estate of one of the victims; and (c) the State knew about and failed to disclose the conflict?

The State of Florida restates these questions as follows:

Whether this Court should grant certiorari to review the state courts' factual findings that, under state procedural rules and statutes, Steinhorst waived disqualification of his postconviction judge by failing to find record evidence that was reasonably available to defense counsel.

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OPINION BELOW

The opinion of the Florida Supreme Court is reported at 695 So.2d 1245, and a reproduction of the slip opinion is appended to Steinhorst's petition. (Pet. app. at 2-21).[1]

JURISDICTION

Steinhorst seeks jurisdiction pursuant to 28 U.S.C. §1257(a).

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[1] "Pet. app. at ___" refers to the appendix to Steinhorst's petition for writ of certiorari. For the Court's convenience, the State of Florida will refer to Steinhorst's appendix instead of duplicating documents in the appendix to this response.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Steinhorst relies on the Fourteenth Amendment to the United States Constitution and on Florida Rule of Civil Procedure 1.540(h) and Florida Rule of Criminal Procedure 3.850.

STATEMENT OF THE CASE AND FACTS

The State of Florida does not accept Steinhorst's Statement of the Case because it is argumentative and, for the most part, irrelevant to the issue currently presented to this Court.

The facts that led to Steinhorst's four convictions of first-degree murder and three death sentences are as follows:

> The testimony at trial showed that the appellant was a participant in a marijuana importation conspiracy. In accordance with the smuggling plan he was present on the night of January 23, 1977, near a beach landing site at Sandy Creek in Bay County. Appellant's job was to guard the entrance to a dirt road leading to the beach where the marijuana was to be brought ashore and loaded on trucks.
>
> Two men, Harold Sims and Douglas Hood, and two teenage girls, Sheila McAdams and Sandra McAdams, approached the place where appellant was standing guard. Although there is nothing to explain their presence at that time and place, one reasonable inference is that

they stumbled on the site of the smuggling operation by chance. The testimony indicates that there was then an exchange of fire between Harold Sims and the appellant. Harold Sims was shot and killed. Appellant then took the other three people captive, and confined them in a passenger van.

The testimony of several witnesses shows that appellant then proceeded to consult with several of his co-conspirators. It appears that Douglas Hood and the two McAdams girls were held captive for several hours while appellant and the leaders of the group decided what to do with them. Meanwhile, the landing and loading of marijuana proceeded almost until morning.

Bobby Joe Vines, the organizer of the smuggling scheme, testified that after the shooting of Harold Sims, appellant asked that his friend Charles Hughes be brought to him. Hughes was summoned from the landing site where he was bringing marijuana ashore. There was testimony from which the jury could infer that when Vines and the other men left the area with their loads of marijuana, appellant and Hughes departed with a human cargo of one dead and three living persons.

Several months later divers discovered the bodies of the victims in a sinkhole in Taylor County. The evidence showed that all four victims had been shot to death. The bodies were weighted down with concrete blocks.

Steinhorst v. State, 412 So.2d 332, 334-335 (Fla. 1982).

By special assignment of the Chief Justice, James C. Adkins, Jr., a sitting Justice of the Florida Supreme Court, conducted Steinhorst's trial in 1978.[2] When Steinhorst filed his first motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850 in 1986, the case came before circuit judge W. Fred Turner. Judge Turner summarily denied the motion, and the Florida Supreme Court directed that an evidentiary hearing be held. Steinhorst v. State, 498 So.2d 414 (Fla. 1986). After that hearing, the court affirmed the circuit court's denial of relief. Steinhorst v. State, 574 So.2d 1075 (Fla. 1991).

In 1991 Steinhorst filed a second postconviction motion, seeking relief based on Florida Rule of Civil Procedure 1.540. That motion alleged that Judge Turner should not have heard the original postconviction motion because, before becoming a circuit judge, Turner represented the estate of Harold Sims, one of Steinhorst's victims. (Pet. app. at 192). Steinhorst also alleged that in 1981 Judge Turner recused himself from the trial of Charlie Hughes, one of Steinhorst's codefendants, based on his connection with Sims' estate. (Pet. app. at 203). Judge Don T. Sirmons heard the second motion and denied relief because

> rule 1.540 is not the proper method to collaterally attack a criminal judgment and sentence under Florida law; a rule 3.850 motion would be untimely and successive; no merit to the claim that Judge Turner should have recused

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[2] The allegations concerning Justice Adkins' feelings about Steinhorst's trial (petition at 5 n.3) are irrevelant to these proceedings. Justice Adkins' affidavit has never been accepted by any court.

> himself from consideration of Steinhorst's 3.850 motion; and orders entered by judges subject to disqualification are not void and are not subject to collateral attack.

(Pet. app. at 137; Steinhorst v. State, 636 So.2d 498, 500 (Fla. 1994); see also pet. app. at 181-83).

On appeal, the Florida Supreme Court agreed with Judge Sirmons that rule 1.540 did not apply. (Pet. app. at 137; Steinhorst, 636 So.2d at 500). That court noted that "no such recusal was ordered [in Steinhorst's case], nor did the judge notify the parties of the potential conflict, even though the reasons for recusal applied equally to both cases." (Pet. app. at 138; Steinhorst, 636 So.2d at 500). The court then set out the positions of the parties on appeal:

> The State calls our attention to the fact that section 38.06, Florida Statutes (1991), appears to render "valid" any order entered by an otherwise-recusable judge when a party has failed to file a timely suggestion of disqualification. Here, the defense did in fact fail to file such a motion in the proceeding in question. However, the defense contends that the failure to determine the trial court's potential conflict occurred in part because the relevant records had been misplaced by the office of the court clerk below. We have no way of knowing if this contention is true, because the trial court below conducted no evidentiary hearing.

(Pet. app. at 138; Steinhorst, 636 So.2d at 500).

Based on applicable state law,[3] the court stated: "If the information regarding the judge's potential conflict was reasonably available and Steinhorst did not move to recuse the judge, then the right to recuse the judge was waived. See Sec. 38.02, Fla.Stat. (1991) (suggestion of disqualification must be filed within thirty days after party or attorney learns of ground for disqualification or ground considered waived)." (Pet. app. at 138; Steinhorst, 636 So.2d at 500). The court then went on to state that, "if the relevant records were not reasonably available to Steinhorst and the conflict could not be ascertained by the exercise of due diligence, then the prior recusal would constitute newly-discovered evidence properly cognizable in a 3.850 motion." (Pet. app. at 138; Steinhorst, 636 So.2d at 500). The court reached this conclusion because of due process concerns "that proceedings involving criminal charges, and especially the death penalty, must both be and appear to be fundamentally fair." (Pet. app. at 138; Steinhorst, 636 So.2d at 501). Thereafter, the court held that an evidentiary hearing should be held and stated that

> if the trial court determines that the "facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence," Fla.R.Crim.P. 3 850(b)(1), then it should grant the motion for postconviction relief, vacate the 3.850 judgment entered by Judge Turner, and conduct a new evidentiary proceeding pursuant to rule 3.850 and this Court's opinion in Steinhorst, 498 So.2d at 414-15.

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[3] Sections 38.02 and 38.06, Florida Statutes (1991), attached to this response as appendices A and B.

(Pet. app. at 139; Steinhorst, 636 So.2d at 501).

Judge Sirmons held the evidentiary hearing in October 1994. In his order denying relief, Judge Sirmons stated the issue as 'if the fact of Judge Turner's recusal could have been ascertained by the exercise of due diligent of the movant or movant's counsel." (Pet. app. at 208). The judge reviewed Steinhorst's evidence and stated:

> The evidence establishes that Judge Turner did not advise counsel of his prior recusal in the Hughes case. However, the evidence also establishes that defense counsel were aware of Judge Turner's "reputation" and as early as November 1, 1986 were actively seeking a way to have him removed from the case. Defense counsel talked to certain members of the local bar about Judge Turner. In this regard, it is important that at no time did defense counsel seek to talk directly by letter, phone or personally to the defense counsel who handled the Hughes case as to what had happened in that case. Instead the evidence on this point is that they "heard" that Hughes defense counsel said he didn't want to cooperate. If contacted defense counsel in the co-defendant's case could have easily advised them of Judge Turner's status in that case. The testimony also establishes that defense counsel and research assistants spent a great deal of time reviewing the contents of the case file contained in the clerk's office in November, 1986 and attempting to obtain information to accomplish their goal of recusing Judge Turner and to assist in filing their 3.850 motion. They now claim that during

this review of the files they never saw any copy of Judge Turner's Order of Recusal in the court file.

(Pet. app. at 208).

The court then turned to the state's evidence and stated:

> Prior to 1988, all of the co-defendant's pleadings, etc., were kept in one filing system chronologically without reference to an individual defendant's name. It is apparent that there were numerous pleadings in this court file however there is no basis to find that the relevant records had been misplaced by the Clerk's office in 1986 or thereafter. Although the records were voluminous and complex, defense counsel or staff was never denied access to them. The contents of the files were there for them to review. Furthermore, there is no showing that anyone associated with the Clerk's office attempted to conceal or hide any information from defense counsel or staff. In addition, defense counsel sought no relief from the Court to make sure that all records were available to it or to correct any perceived problems of access to court records during the course of their review in 1986.

(Pet. app. at 208-09).

Responding to Steinhorst's suggestion that the files were actively concealed, the court stated:

> They now suggest such a problem existed at the time and that precluded them from discovering Judge Turner's recusal order. The evidence establishes, however, that the defense counsel and/or his staff simply overlooked the recusal order contained in the court file during their review. The recusal order was also in the file when it was brought to the evidentiary hearing before Judge Turner in September, 1987. There is no showing that defense counsel re-examined the files immediately prior to or at the evidentiary hearing. It was not until a re-review of the court records in September, 1991 that defense counsel staff found the recusal order. The testimony establishes the files in 1991 were in the same shape they were in since the Clerk reorganized them in August of 1988. The reorganization in 1988 consisted simply of rearranging the pleadings chronologically but also by defendant's individual names. Nothing was added or removed. This is verified by the defense counsel staff testimony that they discovered the recusal order while examining the pleadings relating to the co-defendant, Hughes.

(Pet. app. at 209).

Judge Sirmons then made the following findings of fact based on the evidence presented at the evidentiary hearing:

> The Court therefore finds that through due diligence, the Judge's potential conflict, by virtue of his recusal order of July 9, 1981, was reasonably available to defense counsel at the

> time the 3.850 motion was filed and heard in 1987 and was not misplaced by the Clerk's office. The Court further finds the records of the recusal were ascertainable by the exercise of due diligence prior to the two year time ban of Rule 3.850(b) and is not new evidence. Finally, the Court finds that the information concerning the conflict was reasonably available prior to July 5, 1988, when the defendant filed his Notice of Appeal of the 3.850 judgment and therefore the defendant has waived his right to recuse Judge Turner under F.S. 38.02.

(Pet. app. at 209). Based on these findings, the circuit court denied Steinhorst's second motion for postconviction relief. (Pet. app. at 210).

On appeal, Steinhorst argued that the evidence did not support Judge Sirmons' findings. The Florida Supreme Court set out Steinhorst's argument and then stated:

> However, there was also evidence presented suggesting a different explanation for why the Hughes recusal order may have come from the basement vault in 1991. State witness Gloria Tharpe, an employee of the clerk's office, testified that before 1988, all of the paperwork regarding Steinhorst and his codefendants, known as the Sandy Creek files, was kept together in a roughly chronological but otherwise unorganized fashion. She testified that these files were kept in a file room on the first floor next to the clerk's office. Tharpe further testified that in 1988, when it became necessary to prepare the record on appeal for

> Steinhorst's first 3.850 motion, she reorganized the Sandy Creek files by separating the paperwork according to individual defendant.
>
> Reena Goss Baker corroborated Tharpe's testimony regarding the location of the Sandy Creek files. She testified that between 1985 and 1988, all the pleadings, motions, and orders for all the Sandy Creek defendants were kept on the first floor near the clerk's office. She further testified that only the State's exhibits were kept in the inaccessible basement vault during this time. It was only after the files were organized by individual defendant in 1988 that the files on inactive Sandy Creek defendants were placed in the basement vault.

(Pet. app. at 6-7; Steinhorst v. State, 695 So.2d 1245, 1248 (Fla. 1997), footnote omitted). The court then set out its duty in reviewing evidentiary rulings: "When the evidence adequately supports two conflicting theories, this Court's duty is to review the record in the light most favorable to the prevailing theory." (Pet. app. at 7; Steinhorst, 695 So.2d at 1248). In applying that standard, the court stated that it would "not alter a trial court's factual findings if the record contains competent substantial evidence to support those findings." (Pet. app. at 7; Steinhorst, 695 So.2d at 1248). The court reviewed the evidence and concluded "that the evidence in the record supports the trial court's finding that in 1986, when Steinhorst's attorneys were preparing for the first 3.850 evidentiary hearing, the Hughes' recusal order was in the same court file that contained Steinhorst's paperwork" and found that "the record contains competent substantial evidence to support the trial court's finding that "at no time did defense counsel seek to talk directly or by letter, phone or personally to the

defense counsel who handled the Hughes case as to what happened in that case." (Pet. app. at 7; Steinhorst, 695 So.2d at 1248). The Florida Supreme Court affirmed the circuit court's denial of relief, stating: "Having upheld the trial court's findings of fact, we conclude that the trial court did not err in denying Steinhorst's motion for relief. (Pet. app. at 9; Steinhorst, 695 So.2d at 1249).

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DENY CERTIORARI TO REVIEW THE FACTUAL FINDINGS MADE BY THE STATE TRIAL COURT AND AFFIRMED BY THE STATE SUPREME COURT BECAUSE THOSE FINDINGS ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE IN THE RECORD AND WERE CONSTRUED CONSISTENT WITH STATE STATUTES, RULES, AND CASELAW.

Steinhorst makes two arguments in his petition. First, he argues that, because a defendant has the right to be tried before an impartial tribunal, any waiver of that right should be knowing and intelligent and cannot be presumed. Second, he argues that the due diligence requirement in Florida Rule of Criminal Procedure 3.850 for newly discovered evidence claims places an undue burden on a postconviction movant. In reality, however, Steinhorst is asking this Court to review the factual findings made and affirmed by the state courts because he disagrees with the state courts' conclusion that his postconviction claim of newly discovered evidence (Judge Turner's recusal from the Hughes' trial) was procedurally barred due to lack of due diligence.

In denying Steinhorst relief, the state courts relied on section 38.02, Florida Statutes (1991), which provides in part:

> In any cause in any of the courts of this state any party . . . may . . . show by a suggestion filed in the cause that the judge before whom the cause is pending . . . is interested in the result thereof . . . . Such suggestion shall be filed in

> the cause within 30 days after the party filing the suggestion, or his attorney, or attorneys, of record, or either of them, learned of such disqualification, otherwise the ground, or grounds, of disqualification shall be taken and considered as waived.

(App. A1). The courts of Florida, pursuant to statute, have long held that one must seek disqualification of a judge in a timely manner or the grounds for disqualification will be waived. In re Carlton, 378 So.2d 1212 (Fla. 1978); State ex rel. Ferrera v. Sandler, 152 Fla. 517, 12 So.2d 298 (1943); Dickinson v. Raichl, 120 Fla. 907, 163 So. 217 (1935); State ex rel. Mizner Land Corp. v. Gray, 117 Fla. 294, 157 So. 663 (1934); Skipper v. State, 114 Fla. 312, 153 So. 853 (1934); Giuliano v. Wainwright, 416 So.2d 1180 (Fla. 4th DCA 1982); see Brownlee v. State, 95 Fla. 775, 116 So. 618 (1928); see also Fischer v. Knuck, 497 So.2d 240 (Fla. 1986); Lawson v. Longo, 547 So.2d 1279 (Fla. 3d DCA 1989); In re Paulk, 503 So.2d 368 (Fla. 1st DCA 1987); Data Lease Financial Corp. v. Blackhawk Heating & Plumbing Co., 325 So.2d 475 (Fla. 4th DCA 1975); Oncay v. Oncay, 183 So.2d 878 (Fla. 3d DCA 1966).

The state courts also relied on Florida Rule of Criminal Procedure 3.850(b)(1) which provides that a postconviction motion may be brought outside the time limits of rule 3.850 if the "'facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence.'" (Pet. app. at 139; Steinhorst, 636 So.2d at 501). The state courts have consistently found claims of newly discovered evidence procedurally barred when not made in a timely manner. White v. State, 664 So.2d 242 (Fla.), cert. denied, 116 S.Ct. 591, 133 L.Ed.2d 505 (1995); Bolender v. State, 658 So.2d 82 (Fla.),

cert. denied, 116 S.Ct. 12, 132 L.Ed.2d 896 (1995); Zeigler v. State, 632 So.2d 48 (Fla. 1993), cert. denied, 513 U.S. 830, 115 S.Ct. 104, 130 L.Ed.2d 52 (1994); Lightbourne v. Dugger, 549 So.2d 1364 (Fla. 1989). Lightbourne is close to the instant case factually, but involved an attempt to disqualify a trial judge rather than a postconviction judge. Lightbourne's judge had represented the victim's father while in private practice and told the parties that prior to Lightbourne's 1981 trial. The state courts found his disqualification claim procedurally barred because Lightbourne had access to the facts necessary to making the claim earlier but did not raise it until 1989. Lightbourne, 549 So.2d at 1365-66.

Steinhorst argues that certiorari should be granted because "[t]he Florida Supreme Court agreed that Petitioner had established Judge Turner's blatant conflict of interest and the resulting violation of his fundamental constitutional right to an impartial tribunal." (Petition at 28). This extraordinary statement ignores the conditional nature of the court's directive - a new evidentiary hearing should be held on Steinhorst's first postconviction motion if Judge Turner's recusal from the Hughes' trial could not have been discovered prior to 1991 through the exercise of due diligence. Steinhorst's entire argument ignores the converse of the court's pronouncement, *i.e.*, if Judge Sirmons did not find that due diligence had been exercised, Judge Turner's ruling on the original motion should not be disturbed.[4] Judge Sirmons found, however, and the Florida Supreme Court agreed that Steinhorst had not exercised due diligence and that, therefore, his claim was procedurally barred.

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[4] If a suggestion of disqualification is not timely filed, a judge's orders, judgments, and decrees are valid. §38.06, Fla.Stat. (1991) (App. B1). See Card v. State, 497 So.2d 1169 (Fla. 1986); State v. King, 426 So.2d 12 (Fla. 1982); McNealy v. State, 549 So.2d 248 (Fla. 5th DCA 1989).

In Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), this Court considered 28 U.S.C. §2254(d), which provides that state court factual findings made after an evidentiary hearing shall be deemed correct. Steinhorst claims that the state proceedings violated his due process rights, but has failed to support that claim. Instead, the state courts followed well-established precedent in finding Steinhorst's claim procedurally barred and treated him no differently than any other litigant. Accepting Steinhorst's argument would undo this Court's repeated affirmance of state procedural bars. E.g., Dugger v. Adams, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

Steinhorst argues that the facts do not support the state courts' rulings, but this Court has long held that it does "not grant certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227, 45 S.Ct. 496, 497, 69 L.Ed.2d 295 (1925); Herrera v. Collins, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). Moreover, "[f]ederal courts are not forums in which to relitigate state trials." Herrera, 506 U.S. at 401, 113 S.Ct. at 861, 122 L.Ed.2d at 217 (quoting Barefoot v. Estelle, 463 U.S. 880, 887, 103 S.Ct. 3338, 3391, 77 L.Ed.2d 1090 (1983)). Relitigation of his state proceedings, however, is precisely what Steinhorst is seeking. None of the cases that Steinhorst cites is factually comparable to his case. Bracy v. Gramley, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997), and the other cases are distinguishable because they deal with timely, not untimely, raised claims and because they are concerned with the defendants' trials, not postconviction proceedings. Bracy, moreover, which involved a judge convicted of taking bribes, presents a most egregious situation, one that strikes at the very basis of our legal system and is in no way similar to Judge Turner's situation. Review by this Court would only confirm that, as well as the fact that the state

courts fully considered the issue presented here and decided it correctly.

CONCLUSION

Therefore, the State of Florida asks this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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INDEX TO APPENDIX

1. Section 38.02, Florida Statutes (1991).....[A1]

2. Section 38.06, Florida Statutes (1991).....[B1]

38.02 Suggestion of disqualification; grounds; proceedings on suggestion and effect - In any cause in any the courts of this state any party to said cause, or any person or corporation interested in the subject matter of such litigation, may at any time before final judgment, if the case be one at law, and at any time before final decree, if the case be one in chancery, show by a suggestion filed in the cause that the judge before whom the cause is pending, or some person related to said judge by consanguinity or affinity within the third degree, is a party thereto, or is interested in the result thereof, or that said judge is related to an attorney or counselor of record in said cause by consanguinity or affinity within the third degree, or that said judge is a material witness for or against one of the parties to said cause, but such an order shall not be subject to collateral attack. Such suggestions shall be filed in the cause within 30 days after the party filing the suggestion, or his attorney, or attorneys, of record, or either of them, learned of such disqualification, otherwise the ground, or grounds, of disqualification shall be taken and considered as waived. If the truth of any suggestion does not appear from the record in said cause, the judge may by order entered therein require the filing in the cause of affidavits touching the truth or falsity of such suggestion. If the judge finds that the suggestion is true, he shall forthwith enter an order reciting the ground of his disqualification and declaring himself disqualified in the cause; if he finds that the suggestion is false, he shall forthwith enter his order so reciting and declaring himself to be qualified in the cause. Any such order declaring a judge to be disqualified shall not be subject to collateral attack nor shall it be subject to review. Any such order declaring a judge qualified shall not be subject to collateral attack but shall be subject to review by the court having appellate jurisdiction of the cause in connection with which the order was entered.

38.06 Effects of acts where judge fails to disqualify himself - In any cause where the grounds for a suggestion of disqualification, as set forth in s. 38.02, appear of record in the cause, but no suggestion of disqualification is filed therein, the orders, judgments and decrees entered therein by the judge shall be valid. Where, on a suggestion of disqualification the judge enters an order declaring himself qualified, the orders, judgments and decrees entered therein by the said judge shall not be void and shall not be subject to collateral attack.